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IN THE SUPREME COURT

OF THE

STATE OF UTAH

UNIVERSITY UTAH

DEC 19 1950

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STATE OF UTAH

In the Interest of

KARL BAILEY

Alleged dependent and
neglected child.

Case
No. 8722

APPELLANT'S REPLY BRIEF

Submitted by J. GORDON BAILEY, Father of the
Alleged Dependent and Neglected Child.

ROBERT L. SCHMID,
Attorney for Appellant

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APPELLANT'S REPLY BRIEF

Submitted by J. GORDON BAILEY, Father of the
Alleged Dependent and Neglected Child.

PRELIMINARY STATEMENT

The Society's brief contains assertions of law
and fact sufficiently misleading as to require an
answer.

STATEMENT OF POINTS

POINT I.

THE INCESSANT ALLUSION TO SEX AND ALLEGED PRIOR SEXUAL MISCONDUCT MUST NOT BE PERMITTED TO HINDER AN IMPARTIAL DETERMINATION OF THE REAL ISSUES OF THE CASE.

POINT II.

THE COURT ERRED IN ADMITTING AND IN CONSIDERING IN ITS DECISION EVIDENCE CONCERNING ALLEGED ADOPTIVE PARENTS.

POINT III.

THE JUDGMENT MUST FAIL BECAUSE NEITHER THE EVIDENCE NOR THE FINDINGS OF FACT SUPPORT IT.

ARGUMENT

POINT I.

THE INCESSANT ALLUSION TO SEX AND ALLEGED PRIOR SEXUAL MISCONDUCT MUST NOT BE PERMITTED TO HINDER AN IMPARTIAL DETERMINATION OF THE REAL ISSUES OF THE CASE.

Constant allusion in the Society's brief to sex and alleged prior acts of sexual deviation partake of the tenor of a best seller and by exaggeration and distortion becloud the real issues of the case. This alleged prior misconduct is by repetition and embellishment unjustifiably twisted beyond recognition.

For example, the Society says that "Bailey persistently committed sexual indiscretions upon ... Susan's seven year old sister" whereas the only alleged act described in the record and thus justifying any comment comes from Susan's mother who testified, "Well, he just took hold of her buttocks and said 'Nice buns, Elizabeth.'" (Brief 11, R. 42) The accusation that Gordon persistently committed sexual indiscretion upon Susan's married sister (Brief 11) is an equally sophistic distortion of the record. So also is the Society's absurd contention that " ... he habitually, over her objection, by the use of physical force made her submit to sexual intercourse by the use of the mouth ... " with reference to Susan--Susan, whom the Society accuses of lying about important matters and of breaching her promises to them, Susan, who conceived and abandoned an illegitimate child before she ever met Gordon, who initially proposed that she live with Gordon though believing him already married, who professed that her common law marriage to Gordon she thought to be permanent, at least until the day after Sharp's departure but who, within literally hours, announced her intention to marry Sharp and lost no time in so doing. It is submitted that the juvenile court did not find these alleged acts of prior misconduct to be true and that the constant rehashing of them in the Society's brief serves only to inflame and prejudice by improper constant reference to these slanderous assertions, a technique not unlike the Salem witch hunts of a bygone era.

Why has not the Society, which places such apparent stress upon modern medical treatments, if they seriously believed Gordon to be unfit, sought psychiatric assistance to substantiate their claim or, at the least, to rehabilitate Gordon if there be found any basis to their claim. It is submitted that the use of this abusive, inflammatory, contradictory

testimony and the repeated exaggeration of it evidences but a preformed plan, conceived long before the present proceedings were begun, to sever a natural relationship rather than protect it. However, when this emotionally charged immaterial chaff is blown aside it is quite clear that the alleged acts of prior misconduct, believed or not, are insufficient in law to support a finding of present neglect years later.

POINT II.

THE COURT ERRED IN ADMITTING AND IN CONSIDERING IN ITS DECISION EVIDENCE CONCERNING ALLEGED ADOPTIVE PARENTS.

The Society attempts to justify the flagrant and arbitrary disregard of substantive and procedural law by asserting that the best interests of the child require that it be adopted and by asserting that the blame for any emotional strain caused by a severance of the child-foster parent status rests upon Gordon. It is submitted that any legal or moral blame in this matter must fall squarely and solely upon the shoulders of those who since December 10, 1956, have by disregard of the letter and spirit of the law deprived Karl and Gordon of each other even to the present date. Although some normal readjustment from the artificial to the natural environment is to be expected, it is as nothing compared to the lifetime cruelty and irreparable psychological and emotional damage resulting from a needless adoption. It is nothing short of inhuman to deny a son the right to live in his father's home and to force him into a situation where he will always be required to be beholden to his adoptive parents, will never be able to really feel that he belongs, will forever be the younger "adopted" child in an already grown family, will always be troubled by the fact that he is adopted and will ever

be on probation and public display as Exhibit A if he is good and Exhibit B if he is bad.

True, Lee has had no children of her own and was for a short time a charity patient in a hospital, but despite these asserted monumental drawbacks, it is surely for the best interests of Karl that every effort be made to restore the integrity of his natural family unit which, and only which, can provide him with the care and affection denied him by Susan and which all the artificial family grafting in the world cannot guarantee.

POINT III.

THE JUDGMENT MUST FAIL BECAUSE
NEITHER THE EVIDENCE NOR THE FINDINGS OF
FACT SUPPORT IT.

The Society attempts to support the illegal judgment by what it calls "uncontroverted evidence and admitted facts," which, the Appellant submits, are not uncontroverted nor admitted and which were not found as facts by the trier, but which, even were they true, would not in law support the judgment. Aside from the substantive untenability of the Society's contention, the incorrect and misleading purportedly factual assertions in its STATEMENT OF FACTS AND STATEMENT OF EVIDENCE require a certain minimum of disclosure.

On Pages 1 and 2 of its brief the Society says it cannot agree with the Appellant's statement of facts, but while failing to point out any error therein errs in its own by asserting as fact that the court found Gordon to be "an unfit and improper person" which recourse to the record (R. 22-25) refutes. This unwarranted poetic license ill befits a statement of facts.

The Society's STATEMENT OF EVIDENCE, Pages 3-31, purports in its own words to be "The evidence and proceedings before the juvenile court on the hearing for the determination of Bailey's rights in the child" These twenty-eight pages of brief, while purporting to be "the evidence and proceedings . . ." are in fact an unduly lengthy, repetitive, inflammatory, emotionally charged, overly embellished and exaggerated argument, wholly one sided and completely wresting material out of context, which argument discusses but a portion of the proceedings and evidence. Further, most of the evidence so treated was not found as fact by the court and in any event is legally immaterial to the issues here involved.

Following are a few of the examples of unreliability:

The unqualified factual assertion on Page 2 that Susan pleaded with Gordon to marry her but that he refused. The evidence is in conflict, Gordon testifying to the contrary (R. 255), and the court failed to find on this point.

The unqualified factual assertion that Gordon's home at the Burnham Duck Club is "a small unpainted house, poorly insulated, exposed to the outside elements, with meager furnishings, no wallpaper and insects all over the area" (Brief 10) whereas the overwhelming evidence by disinterested witnesses, including a local father who raised his family in the home, and photographic evidence is to the contrary. (R. 155-156, 170-172. See Exhibit #12 which contains photographs of the interior and exterior of the home.)

Page 15 contains unqualified purportedly factual assertions concerning the health of the child, which again is solely the illusory enlargement of the testi-

mony of Susan and her family, who with the Society, attempt to blame Gordon for alleged lack of medical care and assert that the child was very ill and in great danger. However, the court found that the child was apparently healthy except for not uncommon childhood ailments. Note that Susan and her mother held themselves out as having medical experience and being medical experts, respectively, and implied that they embodied the epitome of the "reasonable man" in this regard, but that according to the Society's own evidence (R. 56-57, 78-79), and although Susan had sole care and custody of Karl for well over three months after she left Gordon, the child received not one whit of medical attention during all this time but was sorely in need thereof when turned over to the Society. This realization, coupled with the testimony of numerous disinterested witnesses and documentary evidence (R. 112-114, 119, 121-122, 130-131, 133-136, 243-244, and see Exhibit #10, a photograph of Karl and his father) not only squarely impeaches the testimony of Susan and her family in this regard, but suggest fabrication in other respects also.

Pages 30-31 asserts that the court expressly found facts showing, inter alia, abandonment, because of failure to support. Upon post mortem reflection it is apparent that Susan and the Society determined in February of 1956, without any examination or hearing whatsoever in the matter that Karl should be forever withheld from his father. Ingenuous indeed is the idea that Gordon's non-support of Karl during the fourteen month period that the Society successfully secreted the child away constitutes legal abandonment.

CONCLUSION

The Society's brief, as well as its actions,

tacitly concedes that it has intentionally elected to abdicate its high position of trust and its responsibilities in this case by initially refusing to exercise even reasonable diligence to identify and notify the father about his nine month old son when it could have done so, then in failing to contact Gordon even after it had a positive identification and had been apprised of his rights to Karl (and of Karl's rights to his father) until nearly four more months had elapsed, next in its utter disregard for the sanctity of the natural family unit in refusing to return Karl to Gordon, and finally assuming but not conceding that they might have had subjective concern about Gordon's fitness as a father their failure to enlist or even recommend medical or psychiatric assistance to determine that fitness and to assist in a rehabilitation were it in fact needed to the only justifiable end that they might be instrumental in preserving the only remaining natural family ties of this infant boy rather than forever splintering them.

However, even disregarding this unfortunate chain of events and the placing of responsibility, the Appellant respectfully prays this court to grant the relief requested in its original brief that in the end right shall prevail and father and son be reunited.

Respectfully submitted,

ROBERT L. SCHMID
Attorney for
J. Gordon Bailey,
Appellant.